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New Solutions to an Old Problem: New York State's Expanding Options for Controlling Oil and Gas Development in Allegany State Park

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NEW SOLUTIONS TO AN OLD PROBLEM

New York State's Expanding Options for Controlling Oil and Gas Development in Allegany State Park

by Charles Alexander

The New York State Office of Parks, Recreation, and Historic Preservation (hereinafter the "Office of Parks") is currently considering a plan which would change much of New York's Allegany State Park from a protected wilderness area to a managed forest. While this plan, the Allegany State Park Recreation Forest Resource Management Plan (hereinafter "the Plan"), is justified in part by its utilization of the Park's vast timber resources, it has been objected to by numerous environmental organizations on the grounds that it would unjustifiably destroy a much rarer New York State resource — lands which remain in their natural state. These environmental groups have moved on various fronts to block the Plan's implementation, one of the most successful of which has been their effort to force the Office of Parks to write as broad and comprehensive an Environmental Impact Statement (EIS) as is possible.

One of the issues which has arisen concerning the Plan's EIS has been the degree to which New York must examine the environmental questions surrounding the Plan's effect on oil and gas development in Allegany. Since the State purchased only the surface rights to much of the land making up Allegany State Park during the Park's creation in the 1920's, the subsurface rights (i.e., the right to extract resources from below the land's surface) have always been held privately. Furthermore, because most of this parkland had already had its plentiful oil and gas reserves tapped prior to 1920, and since the wilderness condition of the parkland provides very little access to much of the park, it comes as little surprise that most of these subsurface rights have never been exercised. If the Plan is implemented, however, both the environmentalists and the Office of Parks realize that the resulting new roadways, along with the developing improvements in oil and gas recovery techniques, will make a certain amount of previously unfeasible oil and gas development economically practical. What these two sides differ over is the degree to which New York State can control this development and the extent to which New York's options for such control should be spelled out in the Plan's EIS.

In its "Legal Background" document, prepared as part of the Office of Park's scoping process for the Plan, the Office of Parks addressed the issue of New York State's ability to regulate oil and gas development by looking at New York's existing laws and concluding that the State's options were rather limited. Short of spending hundreds of millions of dollars to buy the mineral estates outright, the "Legal Background" document seemed to suggest that little or nothing could be done to minimize the environmental impact which oil and gas development would have throughout the Park. The following paper was prepared and presented to the Office of Parks in order to challenge this assertion that New York's options were in fact so limited and to display the various legal devices which other states have used to tackle similar environmental challenges. It is presented here with relatively few changes from the draft which is currently being considered by the Office of Parks.

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Resource development, a stated goal of the Allegany State Park Recreation Forest Resource Management Plan, is an important aspect of the State's responsibility to manage State lands properly. Furthermore, because our nation depends so heavily on fossil fuel for its energy needs, the development of oil and gas deposits under Allegany State Park must be considered an attractive bonus to what is primarily a logging proposal. However, as the State Office of Parks, Recreation and Historic Preservation noted in its "Legal Background" document concerning this plan, resource development is not an issue that can be treated in a vacuum.

> There is, of course, another side to this problem and it goes directly to the responsibility of the office to limit, to the largest extent practicable, any use of the lands within the Allegany State Park that are inconsistent with its ecological and/or recreational value to the general public. It is the responsibility of Parks to make certain that it does all that is possible to protect the values associated with surface resources, especially in those areas that are determined to be of critical environmental importance.[1]

Since over half of the Park's mineral or subterranean rights are privately owned,[2] the State must examine what actions it can take to minimize the impact of these mineral rights on the Park's environment. It has been clear for years that some state regulation of mineral rights is necessary. The Supreme Court of Kansas held as long ago as 1932 that "[t]he ruthlessness with which development of oil-producing land is prosecuted is a matter of common knowledge, and in such cases some regulation is necessary to prevent devastation of governmental, social and property interest."[3] Yet, while problems similar to the one in Allegany State Park have been recognized for years, it is only recently that states have begun exercising the power necessary to take firm control of the situation.

Recent changes in the oil and gas laws of many mineral-producing states provide New York with two ways of increasing its ability to protect Allegany State Park. The first of these would alter the balance of control between surface owners and mineral estate owners in land where these oftentimes antagonistic estates are owned by two different parties. By increasing the surface owner's so-called "correlative rights" in this area, New York State would increase the right of surface owners to control the development of minerals under their property. In parks such as Allegany, where New York State owns only the surface rights to much of the land, this could have an enormous effect on the State's ability to protect the environment. The second method available to the State is the passage of a lapse statute. Such statutes provide a determination of exactly what mineral rights are privately owned and, in addition, allow a state to condition the retention of these rights on some minimal investment in their use.

The two methods listed above are products of the same legal trend; state oil and gas laws are changing in ways that increase a state's ability to control mineral development. Considering the situation in Allegany and, more generally, the environmental questions that surround mineral development throughout our state, New York must be willing to embrace this trend toward increased control and thereby ensure itself the exercisable power necessary to protect the environment. Either by administrative or legislative action, New York must implement those changes enacted by other mineral-producing states which have increased the state's role in this area. This paper will attempt to examine both methods by which New York can bring about such a change.

Increasing the Rights of Surface Owners

Traditionally, the balance of power between surface and mineral estate owners, established through so-called "correlative rights", has been heavily weighted in favor of the mineral estate. The necessity of fostering mineral development has long been used to rationalize this inequity and to thereby justify a free rein for mineral estate owners at the expense of surface owners. This inequity is evidenced by the seemingly neutral fact that owners of mineral estates have uniformly been allowed "reasonable access" to surface lands only to the extent necessary for the utilization of their mineral rights.[4] However, in disputes over what is or is not "reasonable," the mineral estate has traditionally been considered the "dominant" estate.[5] This notion of "dominant" and "subservient" estates has always been a high hurdle for surface owners to bound in disputes over the use of their land. In several states this doctrine has recently shown signs of crumbling. This, in turn, has forced courts to re- evaluate what constitutes a "reasonable" use of surface lands and, accordingly, adjust the balance of correlative rights in favor of the surface owners.

As early as 1971, one commentator noted:

> it has been held in virtually all petroleum producing jurisdictions that the oil and gas lessee has the implied right to use so much of the surface as is 'reasonably necessary' to carry out the purposes of the oil and gas lease. . . But this rule itself is not without limitation. Many courts have recently weakened this principle by stating that even though the mineral lessee has the dominant estate and may use so much of the surface as is reasonably necessary to carry out his operations, he must exercise his rights with *due regard* to the corresponding rights of the surface owner.[6] (emphasis added).

The applicable test is no longer what is reasonable for the mineral owner to do to exploit his mineral estate, but 'what is reasonable under the circumstances for both the mineral owner and the surface owner to insist upon.'

This concept of a "due regard" that mineral estate holders must pay to the rights of surface holders has been the point upon which the balance between surface and mineral rights has recently begun to shift. In *Getty Oil Co. v. Jones*,[7] which one commentator deemed "the most important decision [in the last decade] dealing with the rights of an oil and gas lessee to use the surface,"[8] the doctrine of "reasonable alternatives" was first established. Under this theory, the Texas Supreme Court held that the defendant, Getty Oil Co., had to remove its oil well pumps from the plaintiff's land and replace them with an alternative type of pump that would not interfere with the plaintiff's sprinkler system. By installing this alternative type of pump, the defendant would enable the plaintiff to continue maximizing his use of the surface lands. In its finding, the court stated:

> [t]here may be only one manner of use of the surface whereby the minerals can be produced. [In such a case, the] lessee has the right to pursue this use . . . [However], where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[9]

This interpretation of "reasonable usage of the surface," which took into account the needs and desires of the surface owner, was a departure from the term's traditional definition under which a mineral holder's usage was held reasonable or unreasonable without regard to the problems it caused the surface owner. Obviously, from the surface owner's perspective, the "reasonable alternatives" doctrine was a great step forward.

The rationale of *Getty* has been followed and expanded upon in an ever-increasing number of jurisdictions. The Utah Supreme Court, in *Flying Diamond Corp. v. Rust*,[10] allowed damages to a surface owner based on the refusal of the mineral developer to build a road to a well site that would have minimized the developer's interference with the plaintiff's irrigation system. The court held that since the defendant ignored the plaintiff's reasonable and practical alternative for constructing its well road, the defendant was liable in damages for an unreasonable use of the land. This "reasonable alternative" concept was also embraced by the North Dakota Supreme Court in *Hunt Oil v. Kerbaugh*.[11] In describing its acceptance of this doctrine, the court stated:

> We agree a pure balancing test is not involved under the accommodation doctrine where no reasonable alternatives are available. Where alternatives do exist, however, the concepts of due regard and reasonable necessity do require a weighing of the different alternatives against the inconveniences to the surface owner. Therefore, once alternatives are shown to exist, a balancing of the mineral and surface owner's interests does occur.[12]

Adopting the "reasonable alternative" doctrine could obviously be very helpful to New York State in its efforts to minimize the impact of oil and gas exploration on Allegany State Park's environment. Such an action would send a clear message to the Park's mineral estate holders that although a certain method of mineral development may be the least expensive, it will be unacceptable under the State's definition of "reasonable access" if an environmentally preferable alternative is available. Embracing this doctrine would allow New York State to join a growing number of states in which, according to one commentator, the applicable test is no longer "what is reasonable for the mineral owner to do to exploit his mineral estate, but what is reasonable under the circumstances for both the mineral owner and surface owner to insist upon."[13]

In addition to the increasing acceptance of the "reasonable alternative" doctrine, numerous recent state court decisions have placed other types of limitations on what constitutes a reasonable use of surface land. Perhaps the most interesting of these decisions was handed down by the Michigan Supreme Court in *Michigan Oil Company v. Natural Resources Commission*.[14] This decision upheld the Michigan Natural Resource Commission's protection of a designated wilderness area despite this action's interference with the exercise of private mineral rights. Con-

struing Michigan's Oil Conservation Act of 1939,[15] the Court approved the administrative denial of a drilling permit and in doing so

> . . . gave great weight to the semi-wilderness nature of the land in question, emphasizing the fact that the Pigeon River Forest provides one of the few remaining habitats in the lower peninsula for elk, bear, bobcat, beaver, eagle, and other wildlife. Because of the special value of the land in question for non-oil and gas activities, and because oil and gas development would destroy the wilderness character of such land, the Court held that the Natural Resources Commission had authority to deny a drilling permit in the Pigeon River Forest.[16]

A variety of other courts have based findings of "unreasonable use" of surface lands on the non-use of constructed mineral development facilities. Roads that had been constructed to service potential drilling areas and were subsequently never used constituted an unnecessary and unreasonable use of surface lands in *Texaco v. Joffrion*[17] Similarly, the court in *Lanahan v. Meyers*[18] held that in-ground storage pits which went unused for several years following their construction were an unreasonable use of the land's surface. The *Lanahan* decision was particularly important in that it was the first case in which time was held to be a proper ground for a suit based on unreasonable usage. All these decisions are similar in that they all evidence the recent trend of state courts to broaden the definition of "unreasonable use" in controversies concerning the use of surface lands.

While the state court decisions listed above have had a great impact on the correlative rights held by surface and mineral estate holders, recent legislative acts in this area have proved equally important. As a whole, these acts tend to increase the burden upon mineral developers to restore surface lands to their pre-development condition. These acts, which increase the traditional rights accorded to surface owners, have provided New York with a model for legislative action that could be used to solve environmental problems such as Allegany.

Most of the State statutes passed in this area impose strict liability on users of mineral estates for all damages done to the surface. Such statutes display the increasing degree to which states are rejecting the traditional rule in this area which, as interpreted by New York State's "Legal Background" document,[19] held

> that the owner or lessee of the mineral estate is entitled to use of the surface of the premises without liability for surface damage caused by his operations, so long as such use and the manner of its exercise are reasonably necessary to effectuate the development of the mineral estate.[20]

By shifting the burden of correcting surface damage to the mineral developer, these statutes force developers to "internalize", or factor in, the environmental costs of their undertakings. The North Dakota Supreme Court, commenting on the traditional allocation of surface damage costs, noted that "the social desirability of a rule which potentially allows the damage or destruction of a surface estate equal or greater in value than the value of the mineral being extracted [is, at the very least, very questionable.]"[21] The North Dakota court went on to state that

> [f]uture mineral exploration and development can be expected to expand as our demand for energy sources grow. Equity requires a closer examination of whether or not the cost of surface damage and destruction arising from mineral development should be borne by the owner of a severed surface estate or by the developer and consumer of the minerals.[22]

Since 1980, at least three states have made this "examination" and determined that mineral developers should bear the cost of surface damages. The statutes in these three states, North Dakota,[23] Montana,[24] and Oklahoma,[25] are similar in that they all impose strict liability for surface damages regardless of whether or not the developer has been negligent or in any way "at fault."[26] By passing this type of "strict liability" mining law, New York would join the growing number of states who are forcing mineral estate owners to factor the environmental costs of mineral development into their business decisions. This, in turn, would allow mineral development to take place only in those areas where development is more truly economically efficient. It is important to note that the traditional rule allowing mineral developers to escape the costs of their environmental damage was developed during a period when the importance of environmental protection was not yet recognized. The trend toward imposing liability, however, is based on the realization that mineral development, although as important as ever, is only one important land use and, as such, must be balanced against the potential damage it imposes. Under a strict liability scheme, New York would be assured that funds would be made available for restoring surface lands that suffer developmental damage. In areas such as Allegany State Park, this alteration of the economics of mineral development would greatly increase the likelihood of maintaining the land's present condition.

Many states have passed acts that, although different from "strict liability" statutes, accomplish a similar increase in the rights and protections afforded surface owners. Kansas passed an act in 1957 that requires mineral developers to return land "as near as practicable" to its pre-developed condition, which thereby produces a result nearly identical to that of the "strict liability" statutes.[27] Wyoming's Surface Owner Consent Statute,[28] on the other hand, works very differently to increase the rights of surface owners. Under this law, applicants for mining permits, which are necessary for all mining operations within the state, must include the written consent of the surface owner in their application. Although the statute includes procedures for mediation between surface and mineral owners when a surface usage agreement cannot be reached, the statute, as one commentator noted,

> has the practical effect of reversing the legal position(s) of the surface owner and the mineral estate owner. Before the statute was passed the mineral estate had always been held to be the dominant estate while the surface estate was considered the [sub]servient estate. Now the surface owner. . . is in the dominant bargaining position. According to this statute, no mining can be done in such lands without the surface owner's consent; therefore, mining permit applicants have no choice but to meet the demands of the surface owner.[29]

An alternative method for producing the internalization of environmental costs can be found in the penal "anti-pollution" statutes of Kansas[30] and Oklahoma.[31] Under these statutes, mineral developers who allow pollutants to escape from the development process are subject to criminal penalties. Furthermore, these developers are held strictly liable in all civil actions based on damages resulting from violations of the penal statutes. The criminalization of these offenses shows how seriously many mineral producing states have come to regard the problem of mineral development's environmental costs. However, while the results of these laws will, in many cases, be the same as those under the standard "strict liability" statutes, the penal statutes are subject to enforcement problems that inevitably haunt attempts to solve environmental problems through criminalization (e.g., the high burden of proof placed on the prosecution). It is not surprising, therefore, that the "strict liability" and "owner consent" statutes are currently the statutes most popular with state legislators trying to bring about environmental cost "internalization" in mineral production.

The case and statutory law involved with the "correlative rights" of surface and mineral estate owners shows an unmistakable trend toward increasing the rights of surface owners. As was noted in a 1982 article, "[t]he recent legislative initiatives in North Dakota, Montana, and Oklahoma suggest a growing political power and assertiveness by surface owners. [Furthermore,] *Getty v. Jones* and its progeny suggest an increased willingness by courts to balance the competing and sometimes conflicting interests of the surface and mineral estates."[32] As the environmental costs of mineral development are increasingly recognized, this trend should remain strong and help to produce a mineral development industry that factors in all of its "real" costs. This, in turn, will lead to mineral development decisions based on a more accurate assessment of such production's overall cost to our society. Both these statutory and caselaw developments concerning "correlative rights" provide important tools for controlling mineral development which New York State can use to protect Allegany State Park. That these trends should prove useful for protecting the environment comes as little surprise. As one author commented, "[t]here can be no doubt that the pressures of the environmental movement have been instrumental in causing the courts [and presumably state legislators] to give more and more weight to [the] rights of . . . [surface owners] in disputes which have arisen in this area."[33]

The exercise of private rights on public lands is an intrusion into the public's use of such land. If such intrusions are possible, then managers of public lands must carefully prepare for them; to be caught without a plan of action will surely place a hardship upon the land.

Since the State has a great many options for adjusting the "correlative rights" of surface and mineral estate holders and thereby increasing its control of private production of oil and gas in Allegany, it should carefully assess the various legislative and judicial decisions rendered in other states and select the measures best suited to protecting its sur-

face interests in the Park. By carefully examining the actions taken by other mineral-producing states, New York can dramatically increase its ability to protect the Park's environment. As Dr. Peter Buttner, Director of Environmental Management for the New York State Office of Parks, Recreation and Historic Preservation, stated in his paper detailing New York State's management strategy for oil and gas development on public lands,

> [t]he exercise of private rights on public lands is an intrusion into the public's use of such land. If such intrusions are possible, then managers of public lands must carefully prepare for them; to be caught without a plan of action will surely place a hardship upon the land.[34]

Lapse Statutes

The second legal method New York State can employ in its effort to protect Allegany State Park's environment is the passage of a lapse statute, either separately or in conjunction with other acts designed to increase its rights as a surface owner. Lapse statutes, or dormant mineral statutes as they are often called, have recently gained popularity as a legislative tool for controlling and monitoring mineral estates. These statutes address the rather complex problem of determining exactly what mineral estate rights are held in a given area and by whom they are owned. As Dr. Peter Buttner noted in his paper on New York State's oil and gas development strategy for public lands, "[e]xcepted oil and gas rights are almost always a problem to unravel and authenticate."[35] This problem is particularly difficult in areas such as Allegany, where much of the land was divided into surface and mineral estates more than half a century ago.[36] By determining exactly what areas of the Park are subject to privately held mineral estates, a lapse statute would allow the State to more accurately assess the problems that subsurface rights are likely to cause for any long-range plans designed to protect the Park. Furthermore, after such a statute is passed, carefully targeted acquisitions in park areas that prove to be predominantly clear of private claims may become an important alternative for preserving the wilderness areas of Allegany.

Lapse statutes can be broken down into two general categories:

> (1) Recordation statutes, which impose [only] registration requirements on [all mineral estate holders of land whose surface rights are held separately], with the failure to record resulting in merger with the surface estate or forfeiture to the states; and (2) conventional dormant mineral statutes, which impose specific requirements such as registration, taxation, or actual production, that, if not satisfied in a set time period, will cause the mineral estate to be considered abandoned and will vest the mineral estate in the owners of the surface estate out of which it was carved.[37]

While a "recording" statute may sufficiently answer questions concerning the ownership of mineral rights in Allegany, a "conventional" statute might be additionally helpful in that it would force the owners of economically unfeasible mineral estates to relinquish their unburdened hold on parkland. In explaining the rationale behind Indiana's passage of a "conventional" lapse statute, the Indiana Supreme Court stated that "[t]he Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public."[38] Note, of course, that such a "conventional" statute may force mineral estate owners of Allegany parkland to develop their interests where, absent such a statute, they would be content to let them lie. This, in turn, may have a negative impact on Allegany's environment.Such considerations must be carefully weighed in order to ensure that New York passes a lapse statute that best serves its needs.

Regardless of which type of lapse statute New York enacts, it can expect to face roughly the same series of legal challenges. One such challenge will arise if New York decides to apply its statute retroactively. This type of application would be especially helpful in situations, such as Allegany, where mineral rights that have been dormant for decades may now start causing immediate problems. It should be noted that although most lapse statutes allow for a 20- to 25-year period of inactivity before a mineral estate can be deemed lapsed, not all of these statutes allow for retroactive application. All those that do, however, in-

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clude a grace period following the statute's enactment during which a mineral estate owner can register his mineral rights and thereby avail himself of the full lapse allowance time. Indiana's retroactively applicable "conventional" lapse statute, which was recently upheld by the United States Supreme Court in *Texaco, Inc. v. Short,*[39] includes a two-year grace period during which mineral estate holders can record their interests. Addressing the question of whether this grace period allowed mineral estate holders enough notice as to the law and whether the retroactive application of the statute was constitutional, the Supreme Court in *Texaco* held that "[i]t is settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures."[40]

One argument frequently made by lapse statute challengers is based on the conflict between the traditional legal doctrine of "abandonment" and the way in which lapse statutes work. Since a claim of common law abandonment has always required a demonstration of the owner's *intent* to relinquish his property, the simple neglect of a mineral estate holder's property rights has traditionally not supported such a claim. As a result, the use of the term "abandonment" in numerous lapse statutes has led to challenges claiming that such statutes impliedly require some show of "intent to relinquish." This problem, however, can be simply taken care of by avoiding the term's use. One author, commenting on the Indiana lapse statute's use of the term "extinguished" rather than "abandoned," stated that

> [b]ecause of the possible complications in the use of "abandonment," legislatures would be prudent to draft dormant mineral statutes using other terms to avoid confusion with traditional legal principles of abandonment. Then these principles concerning abandonment . . . would not be 'stumbling blocks' in declaring a statute legally and constitutionally valid.[41]

Other legal challenges that lapse statutes have faced are more complex than the problems with this use of traditional terminology. However, most if not all of these challenges have been discussed and subsequently dismissed by the Supreme Court in *Texaco*. One such argument claims that lapse statutes violate the federal Constitution by impairing the obligation of contracts. Noting the grace period available to mineral estate holders, the Court stated that "a mineral owner may safeguard any contracted obligations or rights by filing a statement of claim in the county recorder's office. Such a minimal 'burden' on contractual obligations is not beyond the scope of permissible state action."[42] Another argument is based on the contention that the operation of lapse statutes allows uncompensated "takings" of private property. To this the Court replied, "[i]t is the owner's failure to make use of the property — and not the action of the State — that causes the lapse of the property right; [hence,] there is no 'taking' that requires compensation."[43]

While the arguments listed above, along with those based on such doctrines as "vagueness" and "equal protection", have been made by many of the various lapse statutes' challengers, perhaps no argument has been made as often or as vehemently as the contention that lapse statutes deny mineral estate owners their right to procedural due process. This claim stems primarily from the Supreme Court's definition of due process issued in *Mullane v. Central Hanover Bank and Trust Co.*[44] In *Mullane*, the Court held that "at a minimum [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[45] In *Texaco*, the Court divided this problem into two distinct issues, the right to "notice" and the "opportunity to be heard." The Court dismissed the "notice" claim by declaring that "[i]t is well established that persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[46] The Court then went on to dismiss the "opportunity to be heard" issue with a more general pronouncement stressing the difference between adjudicative and non-adjudicative proceedings.

> The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply [only] to an *'adjudication'* that is 'to be accorded finality.'[47] (emphasis added)

A careful reading of *Texaco* makes it clear that the Supreme Court, in rejecting the myriad of challenges leveled at Indiana's lapse statute, felt that such statutes are legitimate instruments by which states may control property rights. According to the Court, "just as a state may create a property interest that is entitled to constitutional protection, the state has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[48] Hence, whether New York State believes a "recording" or "conventional" lapse statute would best serve its needs, it is apparent that such an act would pass constitutional muster. Because of the advantages that a lapse statute could provide for the State in confronting its mineral estate problem in Allegany State Park, this option unquestionably deserves very careful attention.

Conclusion

New York State faces a complex problem in Allegany State Park; it must allow private mineral estate owners to make a fair use of their property rights while, at the same time, protecting the Park's environment from irrevokable abuse. Solving such a problem necessitates an ability on the part of the State to control the private mineral development that takes place within the Park's boundaries and, in addition, the assurance that mineral development decisions will take environmental costs into account.Fortunately, the State has a number of legal options by which it can ensure these conditions. The increasing acceptance by numerous State courts and legislatures of the two methods examined in this paper, the enlargement of surface owners' "correlative rights" and the passage of lapse statutes, is a trend that New York State should carefully examine and make full use of. By doing so, New York will greatly increase its ability to prevent long-term environmental damage to Allegany at a relatively small cost.

Although these legal options are presented as a means by which the negative environmental impact of the Allegany State Park Recreation Forest Resource Management Plan could be minimized, their importance might be even greater if this plan were rejected and an effort was made to maintain the Park as a protected wilderness area. In deciding this more immediate question, whether or not the plan for Allegany should be implemented, New York State should not take too lightly the warning President Nixon gave our country in 1973.

> An important measure of our true commitment to environmental quality is our dedication to protecting the wilderness and its inhabitants. We must recognize their ecological significance and preserve them as sources of inspiration and education.[49]

FOOTNOTES

1. "Legal Background," New York State Office of Parks,Recreation and Historic Preservation, Legal Support Document, 8.
2. *Id.* at 4.
3. *Helmerick & Payne, Inc. v. Roxana Petroleum Corp.*, 136 Kan. 254, 14 P. 2d 663 (1932).
4. *Marvin v. Brewster*, 55 N.Y. 538, 53 ALR 3d 16.
5. *Getty Oil Co. v. Jones*, 470 S.W. 2d 618, (Texas, 1971).
6. Jones, Jay W., "The Oil Operator and Surface Damages," 4 Natural Resources Lawyer 339, 341-42 (1971).
7. 470 S.W. 2d 618, (Texas, 1971).
8. Holtin, Paul F., "Recent Developments in Statutory and Judicial Accommodation Between Surface and Mineral Owners," 28 Rocky Mountain Mineral Law Institute 1021, 1067 (1982).
9. *Getty Oil Co.*, 470 S.W.2d at 622.
10. 551 P.2d 509 (Utah, 1976).
11. 283 N.W. 2d 131, (N.D., 1979).
12. *Id.* at 137.
13. Lopez, "Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners," 26 Rocky Mountain Mineral Law Institute 995, 1010 (1980).
14. 406 Mich. 1, 276 N.W. 2d 141 (1979).
15. Mich. Stat. Ann. 13.139(1) (Callaghan 1981).
16. Analysis of *Michigan Oil*, *supra* note 16, from Holtin, *supra* note 8, at 1048.
17. 365 S.W. 2d 827 (Texas, 1963).
18. 389 P.2d 92 (Okl., 1964).
19. "Legal Background," *supra* note 1.
20. *Id.* at 6.
21. *Hunt Oil v. Kerbaugh*, 283 N.W. 2d 131, 135 (N.D., 1979).
22. *Id.*
23. North Dakota Oil & Gas Production Damage Compensation Statute, N.D. Cent. Code 38-11.1-04 (1980).
24. Montana Surface Owner Damage and Disruption Compensation Statute, Mont. Code Ann. 82-10-501-82-10-511 (1981).
25. Oklahoma-Surface Owner Protection Act, Enrolled H.B. No. 1460.
26. Holtin, *supra*, note 8, at 1041.
27. G.S. 1961 supp. 55-132a (Laws 1957, Chap. 318, 1).
28. Wyo. Stat. 35-11-406(b) (x-xii) (1977).
29. Reese, Thomas, "The Surface Owner's Estate Becomes Dominant: Wyoming's Surface Owner Consent Statute," 16 Land and Water Law Review 541, 542 (1981).
30. K.S.A. 55-121 (1964).
31. 52 O.S.A. 296, 303 (1969).
32. Holtin, *supra* note 8, at 1073.
33. Patton, John J., "Recent Changes In the Correlative Rights of Surface and Mineral Owners," 18 Rocky Mountain Mineral Law Institute 19, 40 (1973).
34. Buttner, Peter J.R., "An Environmentally-Sensitive Management Strategy for Oil and Gas Exploration and Development Programs on Public Land," *Northeastern Environmental Science*, Vol. 1, No. 2, 122 (1982).
35. *Id.* at 115.
36. "Legal Background," *supra* Note 1, at 3-4.
37. Norland, Cynthia J., "Dormant Mineral Statutes and Abandoned Several Mineral Interests," 58 North Dakota Law Review 611, 622 (1982).
38. *Texaco, Inc. v. Short*, 406 N.E. 2d 625, 627 (Indiana, 1980).
39. 454 U.S. 516 (1981).
40. *Id.* at 532.
41. Norland, *supra* note 36, at 630.
42. *Texaco*, 454 U.S. at 531.
43. *Id.* at 530.
44. 339 U.S. 306 (1950).
45. Norland, *supra* note 36, at 639-40 quoting from *Mullane* 339 U.S. at 313.
46. *Texaco*, 454 U.S. at 532.
47. *Id.* at 535.
48. *Id.* at 526.
49. "Natural Resources and the Environment," Message on the State of the Union, by President Richard Nixon, Feb. 15, 1973, 9 Presidential Documents 151.